

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 6, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP616

Cir. Ct. No. 2014SC88

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STEVEN K. HOWELL,

PLAINTIFF-APPELLANT,

v.

POLK COUNTY SHERIFF'S DEPARTMENT,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Polk County:
J. MICHAEL BITNEY, Judge. *Affirmed.*

¶1 HRUZ, J.¹ Steven Howell, pro se, appeals a summary judgment entered in favor of the Polk County Sheriff's Department in a small claims negligence action. We affirm.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

BACKGROUND²

¶2 Howell filed a report with law enforcement stating that scrap metal and other property was stolen from his land. Investigator Richard Gearhart of the Polk County Sheriff's Department responded to this report. Howell told Gearhart that, in particular, a nonfunctional outboard boat motor he had salvaged for parts was no longer located on his property.

¶3 Gearhart's investigation uncovered the location of the boat motor in a salvage yard as well as the identity of the purported thieves. Gearhart traveled to the salvage yard to inspect the motor. Howell later confirmed the motor was in fact the one stolen from his property. Gearhart photographed the motor at the salvage yard. He determined there was no need to take possession of the stolen motor, so he instructed the salvage yard to retain the motor pending further notice from the Department. Howell expressly agreed to this arrangement.

¶4 The investigation eventually resulted in the thieves being convicted of charges related to the theft of Howell's property. Howell obtained restitution judgments from both of them. After the proceedings were resolved, Howell

² Howell has failed to provide citations to the record in his briefs when making factual assertions, as WIS. STAT. RULE 809.19(1)(d)-(e) requires.

attempted to obtain possession of the boat motor, but he was unable to do so.³ Howell brought a small claims replevin proceeding against the Department to recover damages relating to the loss of the motor, claiming the Department unlawfully lost or misplaced it. The Department filed a motion for summary judgment, arguing it was entitled to immunity from Howell's claims. The circuit court granted the motion in favor of the Department and dismissed the case.

DISCUSSION

¶5 We understand Howell to raise two primary arguments on appeal.⁴ First, Howell claims statutory immunity under WIS. STAT. § 893.80(4) did not bar his claim because the Department was required by law to ensure the boat motor's

³ The record assembled by Howell is unhelpful in many respects. For example, we are unable to ascertain the fate of Howell's boat motor based on our review of the record. The circuit court noted that Howell did not file a petition pursuant to WIS. STAT. § 968.20 for the return of the motor, but the Department raises no such argument on appeal. The record also does not reflect whether Howell complied with the notice of claim procedure in WIS. STAT. § 893.80(1d) against Polk County or the Department. While a plaintiff is required to provide notice of a claim as a condition precedent of his or her action against a governmental entity, *see Rouse v. Theda Clark Medical Center, Inc.*, 2007 WI 87, ¶¶18-19, 302 Wis. 2d 358, 735 N.W.2d 30, the Department did not argue Howell failed to do so either in the circuit court or now on appeal. As we dispose of this case by affirming the judgment dismissing Howell's claim, we do not further address the issue.

⁴ Howell asserts he was improperly denied a jury trial because a motion for summary judgment cannot be considered in a small claims action. Pursuant to WIS. STAT. § 799.04, "the general rules of practice and procedure in chs. ... 801 to 847 shall apply" to small claims actions. This directive would seem to include WIS. STAT. § 802.08, which governs motions for summary judgment. We ultimately need not resolve this issue, however, because, in the circuit court, Howell only argued summary judgment was inappropriate because a genuine dispute of material fact existed. He did not object to use of the summary judgment as being inappropriate in small claims actions. Howell thus forfeited this argument by failing to raise it in the circuit court. *See Townsend v. Massey*, 2011 WI App 160, ¶27, 338 Wis. 2d 114, 808 N.W.2d 155 (An appellate court is not required to address the merits of a new legal argument on appeal on the grounds that those arguments relate to an issue raised in the circuit court.). Furthermore, he fails to explain or develop this argument on appeal, and we will not consider it as a result. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

return. Second, he argues chapter 950 of the Wisconsin Statutes allows him to pursue a separate claim for money damages against the Department due to the loss of the motor. We reject both arguments.

¶6 We review a grant of summary judgment de novo. *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶15, 253 Wis. 2d 323, 646 N.W.2d 314. Summary judgment is appropriate when it is established there is no dispute of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.

¶7 A defense of immunity under WIS. STAT. § 893.80(4) requires us to assume negligence on the part of law enforcement.⁵ *Lodl*, 253 Wis. 2d 323, ¶17. Having done so here—and thus obviating any issue of material fact regarding the Department’s alleged negligence—we must decide “whether the municipal action (or inaction) upon which liability is premised is entitled to immunity under the statute, and if so, whether one of the judicially-created exceptions to immunity applies.” *Id.* This is a question of law that is reviewed de novo. *Id.*

¶8 WISCONSIN STAT. § 893.80(4) provides immunity from liability for any discretionary act performed by public officers or employees. *Barillari v. City of Milwaukee*, 194 Wis. 2d 247, 257, 533 N.W.2d 759 (1995). If performance of

⁵ WISCONSIN STAT. § 893.80(4) provides:

No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

a duty is ministerial, which is the only exception to immunity in dispute here, there may be liability for negligent performance of that duty. *Id.* “A ministerial duty—whether imposed by law or arising out of dangerous circumstances—is one that is absolute, certain, and imperative. To qualify as ministerial, the time, mode, and occasion for performance of the duty must be so certain that discretion is essentially eliminated.” *Lodl*, 253 Wis. 2d 323, ¶40.

¶9 The Department was not bound by any ministerial duty with respect to the custody or return of the boat motor. Gearhart determined that the difficulties and cost of transport and storage of the boat motor outweighed its estimated value. He exercised discretion in taking photographs of the motor for purposes of the investigation and use in the criminal proceedings rather than seizing and transporting the motor to be used as evidence. Law enforcement officers, in the course of such investigations, “have the latitude to decide how to best utilize law enforcement resources.” *Barillari*, 194 Wis. 2d at 260.

¶10 Howell argues that the Department was required by law—specifically WIS. STAT. §§ 968.205 and 968.18—to ensure that the boat motor was returned to him.⁶ Neither statute is relevant. Section 968.205 governs whether law enforcement must preserve or destroy certain types of evidence that are not at issue here. Section 968.18 requires that officers who seize property without having obtained a search warrant must provide a receipt to the person from whom the property was taken. Regardless of whether this statute creates a ministerial

⁶ Howell also argues that the immunity statute is intended only to apply to “accidents” that occur in the course of duty rather than to “dereliction of duty” by law enforcement officers. He cites neither an affirmative duty that was imposed upon Gearhart here nor any legal authority in support of this argument, so we shall not address it further. See *Elbin*, 146 Wis. 2d at 244-45.

duty, neither Gearhart nor the Department ever seized or otherwise possessed the motor. Howell's conclusory assertion in his reply brief that the "Department did take [Howell's] Boat motor into custody when they informed the Amery Auto Salvage [Yard] to set it aside until further notice" lacks any basis in law or fact and, in any event, is completely unexplained and undeveloped. See *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). As a result, we need not address his argument further. *Id.*

¶11 Howell additionally seems to argue that WIS. STAT. § 950.04(1v)(s) required the Department to return all stolen property to him when the theft trial ended. Howell's argument in this regard is undeveloped to the extent he is contending that § 950.04(1v)(s) describes a true "ministerial duty" with which the Department must comply regarding the boat motor. Regardless, § 950.04 only establishes a "bill of rights" for crime victims. It does not impose a ministerial duty upon law enforcement to return stolen property in a particular manner or at a particular time, much less require law enforcement to take actual custody of that property in the first instance.

¶12 We also reject Howell's contention that a private cause of action is available to him under chapter 950 of the Wisconsin Statutes to recover damages from the Department. This argument is foreclosed by WIS. STAT. § 950.10(1), which explicitly bars a cause of action against a political subdivision of the state for monetary damages due to any act or omission addressed in ch. 950. Howell himself may have petitioned the board to review a claim and bring a forfeiture action under WIS. STAT. § 950.09(2)(d), but this does not grant him any separate right to pursue a claim against the Department.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)4.

